No. 95-813

In The

Supreme Court of the United States

October Term, 1995

BRAD BENNETT, et al.,

Petitioners,

v.

MARVIN PLENERT, et al.,

Respondents.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF CALIFORNIA WATER AGENCIES, THE STATE WATER CONTRACTORS, AND THE CENTRAL VALLEY PROJECT WATER ASSOCIATION IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

The "Citizens Suit" provision of the Endangered Species Act of 1973 (16 U.S.C. § 1540(g)(1)) provides "any person" may commence a civil suit on his own behalf to enjoin the United States, or any other governmental instrumentality or agency, from violating the provisions of the Act or regulations issued thereunder. The questions presented are:

1. Whether standing under the Citizens Suit provision of the Endangered Species Act is subject to a zone of interests test as a further, judicially imposed, prudential limitation on standing;

2. If standing to sue under the Endangered Species Act is subject to prudential limitations, whether those limitations restrict standing to litigants who assert an interest in the preservation of endangered species to challenge government conduct alleged to violate the terms of the Act.

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The decision of the United States Court of Appeals for the Ninth Circuit, *Bennett v. Plenert*, is reported at 63 F.3d 915 (9th Cir. 1995).

INTEREST OF *AMICI*

Pursuant to Rule 37.3 of the Rules of the Supreme Court of the United States, the Association of California Water Agencies, the State Water Contractors, and the Central Valley Project Water Association respectfully submit this brief *amicus curiae* in support of Petitioners. Consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

The people of the State of California are highly dependent upon an intricate network of highly developed water projects to convey water to their cities and farms. This dependence arises from a geographical imbalance of supply and demand. Roughly 75 percent of California's water resources are found north of the Sacramento/San Joaquin River Delta, while approximately 75 percent of the urban and agricultural water demand within California occurs south of the Delta. To deal with this geographical imbalance, both the state and federal governments have constructed water projects which transfer water from where it is found to where it is consumptively used. Together, the State Water Project, an element of the State Water Development System ("State Water System"), and the federal Central Valley Project provide water to more than two-thirds of California's urban population and the

vast majority of its farmland. The Sacramento/San Joaquin River Delta is a critical link in the conveyance of California's water from the north to the south.

Amicus, Association of California Water Agencies ("ACWA"), is a non-profit, incorporated association comprised of 420 local public agencies which supply and manage California's water resources. These agencies supply water, at the wholesale or retail level, or both, to nearly all urban households in California and to more than 8 million acres of farmland. ACWA members also provide flood control for millions of Californians and manage many of the State's groundwater basins. Many of the members of ACWA receive their water supply directly or indirectly from the State Water System, from the federal Central Valley Project, or from the federal Colorado River Basin Project.

Amicus, State Water Contractors ("Contractors"), is a non-profit, incorporated association comprised of 27 public agencies formed under the laws of the State of California. Each of the member agencies holds a contract with the State of California to receive water from the State Water System. By means of these contracts, the State Water System supplies water to some 21 million urban residents and nearly a million acres of farmland.

Amicus, Central Valley Project Water Association ("CVPWA"), is a non-profit, incorporated association comprised of 80 public agencies formed under the laws of the State of California. Each of the member agencies holds a contract with the United States Department of Interior, Bureau of Reclamation, to receive water from the

federal Central Valley Project. By means of these contracts, the Central Valley Project provides 4 million households and 3 million acres of farmland with all, or a portion, of their water supply.

Historically, the balance between distribution for consumptive use by water users, on the one hand, and the allocation of water for environmental maintenance or enhancement, on the other, was determined by provisions of water right permits or licenses issued by the State of California. *See California v. United States*, 438 U.S. 645 (1978); *see also* California Water Code §§ 1243, 1243.5 and 1257.5. More recently, however, the operations of the water projects, particularly the State Water System, the Central Valley Project, and the Colorado River Basin Project, and thus, the balance between consumptive and environmental water use, have been significantly affected by directives of the United States Fish and Wildlife Service and National Marine Fisheries Service under authority of the federal Endangered Species Act ("Act"), 16 U.S.C. § 1531 *et seq.*

This fundamental shift in regulatory authority results from the fact that the Sacramento/San Joaquin River Delta and the Colorado River provide habitat for numerous aquatic species listed under the Act. In particular, the winter-run chinook salmon, an anadromous species listed as endangered, 50 C.F.R. § 17.11, uses the Delta as part of its migration corridor to and from the Pacific Ocean. The delta smelt, listed as a threatened species, *id.*, is largely resident within the Delta year round. Four native fish species that inhabit the Colorado River are also listed as endangered under the Act: the Colorado

squawfish, the humpback chub, the bonytail chub, and the razorback sucker. *Id*.

Based upon the conclusions of the United States Fish and Wildlife Service and the National Marine Fisheries Service regarding requirements for the preservation of these species, the operational standards and criteria for the water projects have been radically altered. As a result of these changes, the water supply available to California's cities and farms has been significantly reduced, and the ability of *Amici* to meet the water supply needs of their constituents has been directly impaired.

California also provides habitat for many terrestrial species listed as threatened or endangered under the Act. Actions taken to protect these species also affect the operations of agencies which comprise *Amici*. For example, in the San Joaquin Valley of California, routine activities to maintain water conveyance facilities are disrupted or precluded because those activities may harm the habitat of the San Joaquin kit fox or Tipton kangaroo rat which are listed as endangered. *Id*. Similar activities are affected in the Sacramento Valley of California in order to prevent harm to the giant garter snake which is listed as threatened. *Id*.

In addition to receiving water from the State Water System, the Central Valley Project, or the Colorado River Basin Project, many member agencies of ACWA, CVPWA, or the Contractors, have constructed, or are constructing, their own water projects. Regulation under the Act has significantly affected these efforts. For example, the Metropolitan Water District of Southern California, a member of ACWA and the State Water Contractors, was required

to purchase and set aside substantial acreage in connection with its construction of the Domenigoni Valley Reservoir in order to provide habitat for the least Bells vireo and other listed species. Similarly, Contra Costa County Water District, a member of ACWA and the CVPWA, was required to create an endangered species reserve in connection with its construction of the Los Vaqueros Reservoir Project in the Sacramento/San Joaquin Delta.

These are only a few examples of the Act's impact on *Amici*, its member agencies and all those served by these agencies. As of June 1993, California provided habitat to 109 species listed as endangered or threatened pursuant to the Act and 48 species proposed for listing. Consequently, regardless of the region of California in which a member agency of either ACWA, the Contractors, or CVPWA finds itself, its water supply or operations are likely to be affected by efforts undertaken to protect species listed as endangered or threatened under the Act.

STATEMENT OF THE CASE

Petitioners are ranchers and irrigation districts which receive water from the Klamath Project, operated by the United States Bureau of Reclamation ("Bureau"). *See* Complaint, ¶¶ 5, 9. As a result of a consultation between the Bureau and the United States Fish and Wildlife Service pursuant to Section 7 of the Act, water in two Klamath Project reservoirs that the Bureau would have otherwise allocated to Petitioners was maintained in the reservoirs. The purpose of maintaining this excess water was purportedly to avoid jeopardy to the Lost River

sucker and the shortnose sucker, which were listed as endangered in 1988. Complaint, ¶¶ 10, 14-19, 21.

Petitioners filed suit against Respondents, the Secretary of Interior, and Fish and Wildlife officials, pursuant to the Citizens Suit provision of the Act.[1] In their Complaint, Petitioners alleged that Respondents violated the Act by: (1) determining under Section 7(a)(2) of the Act[2] that the proposed operation of the project would result in jeopardy to the fish, and that restrictions should be imposed on withdrawals for irrigation, without data to support those conclusions and in the face of information

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[1] Section 11(g)(1), 16 U.S.C. § 1540(g)(1) provides, in pertinent part:

> Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf –
>
> > (A) to enjoin any person, including the United States . . . , who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. . . .

[2] Section 7(a)(2), 16 U.S.C. § 1536(a)(2), provides, in pertinent part:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined . . . to be critical, unless such agency has been granted an exemption for such action. . . . In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

suggesting that fish populations were stable;[3] and (2) by issuing a biological opinion which, by setting forth hydrologic requirements in reservoirs where the suckers live, implicitly determined "critical habitat" for the fish under Section 4 of the Act without considering the economic impacts of that critical habitat designation, as required under Section 4(b)(2) of the Act. Complaint, ¶¶ 22, 31.[4]

The United States District Court for the District of Oregon granted Respondents' Motion to Dismiss based upon Petitioners' lack of prudential standing, and the United States Court of Appeals for the Ninth Circuit affirmed the dismissal.

In its opinion, the Court of Appeals rejected Petitioners' contention that the prudential "zone of interests" test was rendered inapplicable by the Act's Citizens Suit provision. 63 F.3d at 918. The Court held that Petitioners failed the "zone of interests" test because "only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." *Id.* at 919 (emphasis in original). The Court concluded that only species preservation interests satisfy the "zone of interests" test because "[t]he overall purposes of

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[3] Complaint ¶¶ 9-21, 24-29.

[4] Section 4(b)(2), 16 U.S.C. § 1533(b)(2) provides, in pertinent part:

> The Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact, and any other relevant impact, of specifying any particular area as critical habitat.

the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the [Petitioners'] challenge." *Id.* at 920. Because Petitioners use project water for irrigation and recreation, not species preservation, the Court concluded that Petitioners were asserting a "competing interest" in the water which was "inconsistent with the Act's purposes." *Id.* at 921. Finally, the Court concluded that, notwithstanding the mandate of Section 4(b)(2) requiring the Secretary to consider the economic impacts of designating critical habitat, Congress "did not intend impliedly to confer standing on every plaintiff who could conceivably claim that the failure to consider one of those factors adversely affected him." *Id.*

This Court granted Petitioners' Petition for Writ of Certiorari on March 25, 1996. *Bennett v. Plenert*, ___ U.S. ___, 116 S. Ct. 1316 (1996).

SUMMARY OF ARGUMENT

Pursuant to the "standing" requirements of Article III of the United States Constitution, "the plaintiff must show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). In addition to the requirements of Article III, the judiciary has established "prudential" limits on standing. *Id.* Included among these prudential limitations is the "zone of interests' test which

was first enunciated as a standing requirement in *Association of Data Processing Service Org., Inc. v. Camp*, 397 U.S. 150 (1970). In that case, the Court held that a plaintiff seeking judicial review under the Administrative Procedure Act must demonstrate that "the interest sought to be protected by [the litigant] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 153. However, the Court has subsequently commented that the zone of interests test "is not meant to be especially demanding." *Clarke v. Securities Industry Ass'n*, 479 U.S. 388, 399 (1987). Furthermore, "Congress may, by legislation, expand standing to the full extent permitted by Art. III, thus permitting litigation by one who otherwise 'would be barred by prudential standing rules.' " *Gladstone, Realtors*, 441 U.S. at 100 (*quoting Warth v. Seldin*, 422 U.S. 490, 501 (1975)).

As discussed herein, the Court of Appeals' application of the zone of interest test to the Citizens Suit provision of the Act unnecessarily raises serious constitutional concerns by burdening Petitioners' First Amendment right to petition government. Rather than adhering to a narrow interpretation, a broader interpretation of standing under the Act avoids this infringement of constitutional rights, and is therefore to be preferred. In addition, in affirming the district court's dismissal, the Court of Appeals erred in finding that Petitioners were not within the Act's zone of interests since Congress expressly recognized the interests of water agencies in its 1982 amendment of the Act. These water agencies are, in reality, the entities actually regulated. Furthermore, the Court of

Appeals' reliance on the Act's "general" purpose improperly ignores the specific means and limitations as enacted by Congress. The Court of Appeals' narrow interpretation of standing under the Act, despite the broad statutory language, casts doubt on Congress' ability to allow judicial review to the full extent permitted by Article III.

ARGUMENT

I. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST UNNECESSARILY INFRINGES ON THE FUNDAMENTAL RIGHT TO PETITION GOVERNMENT.

There exists in the western United States today a growing disrespect for the federal government's management of natural resources. *Unrest in the West*, TIME, Oct. 23, 1995, at 52-66. In considerable part, this frustration has resulted from what is perceived to be the onerous and unjustified application of the Endangered Species Act. *This Land is Whose Land?* TIME, Oct. 23, 1995, at 68-71. As one commentator noted: "[w]ater development activities are now evaluated, in part, by backdoor federal water-related land use planning processes under the environmental programs that Congress has superimposed on resource development programs." A. Dan Tarlock, *The Endangered Species Act and Western Water Rights*, 20 LAND AND WATER LAW REVIEW 2 (1985). In some circumstances, this disrespect has resulted in intentional disobedience of the law without apparent concern by local law enforcement agencies. *Recording Indicates Rancher, Not Agents, Aggressive*, THE IDAHO STATESMAN, Sept. 14, 1995.

The frustration of individuals in the position of Petitioners is easily understood. In this case, ranchers and irrigation districts who are directly affected by implementation of the Act are being told that, notwithstanding the broad language in the Citizens Suit provision of the Act, they are barred from raising their grievances in court because their interests compete with those of the Lost River sucker and shortnose sucker. 63 F.3d at 921.[5] In other words, even if the action of the Fish and Wildlife Service may be arbitrary or taken in violation of the provisions of the Act, Petitioners are barred from seeking redress for their grievances through the courts. As a consequence, the judicial system is open only to those who allege an interest in the preservation of endangered species.

Barring one side of a controversy from access to the courts should not be permitted as a matter of public policy. Nor is it permitted as a matter of constitutional law. The right of access to courts is but one aspect of the First Amendment right to petition government for redress of grievances. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). As the Court has proclaimed: "The right to sue and defend in the courts is the alternative of force. In an organized society

[5] In deciding an action brought by hydropower operators challenging restrictions under the Act, the Ninth Circuit observed that: "[t]he plaintiffs are entitled to standing because preservation of the salmon will, in the long run, reduce their cost." *Pacific Northwest Generating Cooperative v. Brown*, 38 F.3d 1058, 1067 (9th Cir. 1994). Similarly, Petitioners arguably have an interest in restoration of the species which could therefore result in rendering the Act's restrictions unnecessary.

it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship. . . . " *Chambers v. Baltimore & Ohio, R.R.*, 207 U.S. 142, 148 (1907). Although this right is limited by principles of Article III standing, the creation of artificial barriers should be thoroughly scrutinized. *See Wayte v. United States*, 470 U.S. 598, 610 n. 11 (1984) (although the right to petition and right to free speech are separate guarantees, they are related and generally subject to the same constitutional analysis); *see also Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976) (a legislative classification which burdens a fundamental right is subject to heightened scrutiny).

In another context, this Court very recently observed:

> The resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence. . . .
>
> It is not within our constitutional tradition to enact laws of this sort. Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that *government and each of its parts remain open on impartial terms to all who seek its assistance.* " 'Equal protection of the laws is not achieved through indiscriminate imposition of inequities.' " *Sweatt v. Paitner*, 339 U.S. 629, 635 (1950) (*quoting Shelley v. Kraemer*, 334 U.S. 1, 22 (1948)). Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. *A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial*

> *of equal protection of the laws in the most literal sense.* "The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.' " *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (*quoting Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886)).

Romer v. Evans, ___ U.S. ___, slip op. at 8, 1996 WL 262293 at *18-19 (1996) (emphasis added).

Despite the broad language contained in the Citizen Suit provision of the Act, 16 U.S.C. § 1540(g)(1), the Court of Appeals opted to interpret the provision in a narrow fashion which infringes Petitioners' fundamental right to petition government for the redress of grievances. This interpretation gives rise to serious issues under the constitutional jurisprudence of this Court, and it is contrary to "the maxim that statutes should be construed to avoid constitutional questions. . . . " *United States v. Batchelder*, 442 U.S. 114, 122 (1979). Moreover, given the broad language of the Citizens Suit provision, it is difficult to see the necessity of raising this constitutional issue to implement the intent of Congress. Thus, the Court should reject the Court of Appeals' narrow interpretation and thereby avoid the need to address the serious constitutional issues raised by its holding.

II. APPLICATION OF THE ZONE OF INTERESTS TEST FRUSTRATES CONGRESSIONAL POLICY CONCERNING DEFERENCE TO STATE REGULATION OF WATER RESOURCES.

Embodied in numerous federal statutory schemes is a deference to regulation of water resources by the states. This deference is stated expressly in Section 8 of the

Reclamation Act of 1902, which provides, in pertinent part:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. *See also PUD No. 1 v. Washington Dept. of Ecology*, ___ U.S. ___, 114 S. Ct. 1900, 1913-1914 (1994) (Clean Water Act, 33 U.S.C. § 1251 *et seq.*, to be administered so as to avoid interference with state's water allocations).

Similar deference was expressed by Congress when it amended the Endangered Species Act in 1982. Pub. L. No. 97-304, § 9(a)(2), 96 Stat. 1426 (1982). Pursuant to these amendments, Section 2(c)(2) of the Act provides:

> It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

16 U.S.C. § 1531(c)(2). Although this statement of congressional policy was not meant to change federal or local law, through it Congress:

> [R]ecogniz[ed] the individual State's interest and, very often, the regional interest with respect to water allocation. The policy statement contained in this amendment recognizes that most of the potential conflicts between species conservation and water resource development can be avoided through close cooperation between local, State and Federal authorities.

S. REP. NO. 418, 97th Cong., 2d Sess. 25 (1982). Consistent with this statement of policy, Senator Symms commented that the amendment

> recogniz[es] the complex system of western water laws that govern the agriculture productivity and power-generating capacity of Western States such as my own, and was vital to the bill's acceptability. We in the West are always wary of legislation that poses feasible threats to the supremacy of the States in the appropriating of the water that is the lifeblood of our existence.

128 CONG. REC. 13,183 (1982). The Act's impact on water allocation was demonstrated during hearings before the Subcommittee on Environmental Pollution of the Senate Committee on Environment and Public Works prior to passage of the 1982 amendments. At these hearings, Roland C. Fisher, of the Colorado River Water Conservation District, testified that:

> One result of the Act's inflexibility which is of real concern to us, and should be of concern to all, is the de facto interstate apportionment and intrastate appropriation of waters which the FWS [Fish and Wildlife Service] is effectively accomplishing by imposing substantial minimum flow releases on water storage projects.

For example, in order to obtain a non-jeopardy opinion on the Colorado River squawfish from FWS on its White River Dam, the State of Utah recently had to agree to release a minimum of 250 second-feet (cfs) of water at the dam during most of the year, with higher releases in the spawning period, and to augment the minimum flow by up to 5000 acre-feet from inactive storage when natural river flows fall below the 250 cfs minimum and as the matter stands now, our own sub-district's Taylor Draw reservoir, also to be constructed on the White River above Utah's project, will be forced to release up to 200 cfs, depending upon river flows. All of this has the potential to interfere with appropriative rights under State water laws as well as interstate apportionments under the Upper Colorado River Basin Compact.

Tarlock, *supra*, at 1-2 (*quoting Endangered Species Act Amendments, 1982: Hearing on S. 2309 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 97th Cong., 2d Sess. 235-36 (1982)); *see also* WESTERN STATES WATER Issue No. 535 (August 17, 1984) (Former Congressman Cheney stated that: "[T]he Endangered Species Act has gone beyond its original purpose and will stop water projects in the West. It even runs the risk of redoing all of the interstate compacts governing which state gets what share of available water supplies.")

The 1982 amendment to the Act granted to local water agencies, such as Petitioners Horsefly Irrigation District and Lingell Valley Irrigation District, special status in obtaining federal cooperation in resolving water resource management issues with minimal conflict with

the Act. Thus, these agencies have a unique interest that is recognized by the terms of the Act. Notwithstanding this unique interest, the Court of Appeals interpreted the Act's Citizens Suit provision narrowly by applying to Petitioners the zone of interests test. This interpretation frustrates the Congressional policy of promoting cooperation between federal agencies and local agencies in resolving issues involving water resources. Indeed, the Court of Appeals' decision renders local agencies with jurisdiction over water resources powerless to protect their interests.

III. PRUDENTIAL STANDING IS INAPPLICABLE TO PETITIONERS WHO STAND IN PLACE OF THE AGENCY DIRECTLY REGULATED.

In its opinion, the Court of Appeals acknowledged that the prudential standing doctrine embodied in the zone of interests test does not apply in circumstances where the litigants stand in the same position as the entity regulated directly. 63 F.3d 920 n. 6 (*citing Clarke*, 479 U.S. at 400). In the circumstances of this case, the Petitioners stand in the position of the entity directly regulated. Indeed, *only* Petitioners, or others similarly situated, have an interest in seeking to enforce the purposes for which Congress amended the Act.

Pursuant to the Reclamation Act of 1902, the right to the use of water acquired by the Bureau under provisions of the Federal reclamation law is appurtenant to the land irrigated. 43 U.S.C. § 372. One district court has analogized the relationship between a water user and the

Bureau to the relationship between an owner of property and a lienholder:

> The water rights on the Newlands Project covered by approved water right applications and contracts are appurtenant to the land irrigated and are owned by the individual landowners in the Project. . . . The United States may have title to the irrigation works, but as to the appurtenant water rights it maintains only a lienholder's interest to secure repayment of the project construction costs.

United States v. Alpine Land and Reservoir Co., 503 F. Supp. 877, 879 (D. Nev. 1980), *modified*, 697 F.2d 851 (9th Cir.), *cert. denied*, 464 U.S. 863 (1983); *see also Nevada v. United States*, 463 U.S. 110, 124 (1983); *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937).

In this case, Clear Lake and Gerber Reservoirs were constructed and historically operated to provide irrigation water to farmers and ranchers in southern Oregon, including Petitioners. Complaint, ¶¶ 9-12. The water left in these reservoirs as a result of the consultation between the Bureau and the Fish and Wildlife Service was water which Petitioners were entitled to use, 43 U.S.C. § 372, and in reality, it is Petitioners who are the subject of the contested regulatory action. For this additional reason, the application of the prudential standing rule to Petitioners is inappropriate.

In the circumstances of this case, the directly regulated agency is a sister agency of the regulator within the Department of Interior and therefore, it is almost inconceivable that the Bureau would bring and diligently prosecute an action to enforce the Act. Petitioners, on the

other hand, are in reality the "object of the action . . . at issue." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Petitioners have the greater interest in enforcing the Act, and the zone of interests test should not bar their action.

IV. THE ZONE OF INTERESTS TEST SHOULD CONSIDER AN ACT OF CONGRESS AS A WHOLE RATHER THAN RELY ON JUDICIAL INTERPRETATION OF AN ACT'S PRIMARY PURPOSE.

This Court has warned lower courts of the dangers of focusing solely on the broad purpose of a statute and ignoring its individual sections. In *Rodriguez v. U.S.*, 480 U.S. 522 (1987) (per curiam), the Court explained:

> [N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.

Id. at 525-526 (emphasis in original).[6]

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[6] More recently, in dissent in *Babbitt v. Sweet Home Ch. of Commun. for Great Or.*, ___ U.S. ___, 115 S.Ct. 2407, 2426 (1995), Justice Scalia noted:

> Deduction from the "broad purpose" of a statute begs the question if it is used to decide by what *means* (and hence to what *length*) Congress pursued that purpose; to get the right answer to that question there is no substitute for the hard job (or in this case, the quite simple one) of reading the whole text. "The act must

In this case, the Court of Appeals held "that only plaintiffs who allege an interest in the *preservation* of endangered species fall within the zone of interests protected by the ESA." 63 F.3d at 919 (emphasis in original). In reaching this conclusion, the Court observed:

> The overall purposes of the ESA are singularly devoted to the goal of ensuring species preservation; they do not embrace the economic and recreational interests that underlie the plaintiffs' challenge.

Id. at 920. From this statement, it is apparent that the Court of Appeals focused on a single purpose of the Act in conducting its analysis, and it did not consider relevant to its inquiry the limitations on or means of achieving that purpose specified by Congress.

Had the Ninth Circuit considered these limitations and means, it would have discovered that Congress did attempt to require federal agencies to consider the impacts on persons affected by regulation under the Act in their decision making. In Section 4(b)(2), for example, one of the sections which Petitioners sought to enforce, Congress directed the Secretary to "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat" when designating critical habitat. 16 U.S.C. § 1533(b)(2). This section, among others, was added to the Act in 1978:

> [T]o retain the basic integrity of the Endangered Species Act, while introducing some flexibility

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do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter. (Emphasis added.)

> which will permit exemptions from the Act's stringent requirements. At the same time, the legislation aims to improve the listing process and the public notice process of proposed listing and designations. These improvements will insure that all listing and designations are made by the Department of Interior only after a thorough survey of all of the available data, and only after notice to the local communities that will be most affected by any listing or designation. . . .

H.R. REP. NO. 1625, 95th Cong., 2d Sess. 14 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9464.

In analyzing the 1978 amendment to the Act, the House Report further stated:

> Up until this time, the determination of critical habitat has been purely a biological question. With the addition of this new paragraph, the determination of critical habitat for invertebrate takes on significant added dimensions. Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species. . . .
>
> [T]he result of the committee's proposed amendment would be increased flexibility on the part of the Secretary in determining critical habitat for invertebrates. Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat of an invertebrate species. . . .

Id. at 17, 1978 U.S.C.C.A.N. at 9467.

These statements exhibit a Congressional intent to expand the Secretary's analysis when designating critical habitat to include an analysis of a designation's impact on a community's economy. The Petitioners' economic injury falls within the "zone of interests" protected by Section 4(b)(2) of the Act. Other examples include sections 2(c)(2), 16 U.S.C. § 1531(c)(2) and 7(b)(3)(A), 16 U.S.C. § 1536(b)(3)(A), which also reflect an effort by Congress to reconcile species protection with other legitimate objectives.

Only by focusing exclusively on the primary overall purpose of the Act, and ignoring these sections, could the Court of Appeals conclude that Petitioners' interests fall outside of the zone of interests protected by the Act. Consistent with principles of construction, the Court should reject the attempt to define the "zone of interests test" simply by reference to the overall purpose of a statute. *See Rodriguez*, 480 U.S. at 525-526 (improper to assume that whatever furthers a statute's primary purpose must be the law). Moreover, the Court should reaffirm the long-standing principle of construction that all parts of a statute are to be given effect. *United States v. Menasche*, 348 U.S. 528, 538-539 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute."). Congress' overall general purpose should not govern at the expense of the specific means and limitations adopted by Congress.

V. THE COURT OF APPEALS' APPLICATION OF THE ZONE OF INTERESTS TEST CONFLICTS WITH CONGRESSIONAL POLICY AFFORDING BROAD ACCESS TO THE JUDICIARY.

In analyzing the applicability of prudential limits on standing, the Court has held that: "Congress may, by legislation, expand standing to the full extent permitted by Art. III. . . . " *Gladstone, Realtors*, 441 U.S. at 100. Furthermore, "[w]here statutes are concerned, the trend is toward enlargement of the class of people who may protest administrative action." *Association of Data Processing Service Org.*, 397 U.S. at 154. For example, in analyzing actions under sections 810 and 812 of Title VIII, 42 U.S.C. §§ 3610 & 3612, the Court has instructed that: "[s]tanding under § 812, like that under § 810, is as broad as is permitted by Article III of the Constitution." *Gladstone, Realtors*, 441 U.S. at 109 (internal quotations and citations omitted). Similarly, the Court has approved a holding that the "a person claiming to be aggrieved" language of 42 U.S.C. § 2000e-5 evidences a congressional intent "to define standing as broadly as permitted by Article III." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) (*citing Hackett v. McGuire Bros., Inc.*, 445 F.2d 442 (3rd Cir. 1971)).

As noted by one commentator, Congress has expanded standing in various areas including civil rights, consumer interests and as relevant to the present case, environmental interests. 13A Charles Wright, Arthur Miller & Edward Cooper, Federal Practice and Procedure § 3531.13, at 71 n. 10 (2d ed. 1984) (citing various environmental statutes). The Court has previously observed the "broad category" of potential plaintiffs encompassed

within the Federal Water Pollution Control Act. *Middlesex County Sewage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16-17 (1981). The Court made this observation in analyzing the "citizen suit" provisions of the Marine Protection Research and Sanctuaries Act whereby it also noted that the provisions of the Marine Protection Act are almost identical to the Water Pollution Control Act. *Id.* In commenting on the House version of the 1973 Amendments to the Act, the House Report notes that the Act's proposed citizen suit provisions are "[p]arallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion." H.R. REP. NO. 412, 93rd Cong., 1st Sess. 19 (1973). At the very least, an inference exists that Congress intended to allow suits by a "broad category" of potential plaintiffs under the Endangered Species Act.

Moreover, as enacted by Congress in 1973, the Citizens Suit provision of the Act provides that "any person" may commence a civil suit on his own behalf to enjoin the United States from violating the provisions of the Act or regulations issued thereunder. In commenting on the House version of the amendments, the House Report reiterates that this provision allows "[a]ny person . . . to seek redress involving injunctive relief for violations or potential violations of the Act." *Id.* Nothing in the history of this broad language suggests that "any person" is somehow limited to only "certain persons." Such a limiting construction conflicts with the principle that "[t]here is no presumption against judicial review and in favor of administrative absolutism . . . , unless that purpose is fairly discernible in the statutory scheme." *Association of Data Processing Service Org.*, 397 U.S. at 157. Moreover,

placing a narrow construction on the broad congressional directive of the Act casts doubt on Congress' ability to expand standing to the extent allowed by Article III, and violates this Court's directive that "at the bottom" the question of standing turns on congressional intent. *Clarke*, 479 U.S. at 400.

CONCLUSION

For the foregoing reasons, *Amici* submit that the Court should reverse the decision of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of this case, and remand this case for further proceedings.

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Respectfully submitted,

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